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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

REPLY BRIEF OF PETITIONER

DAVID M. EBEL
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202
Telephone: (303) 892-9400

Court-appointed Counsel
for Petitioner

Of Counsel:

RICHARD A. SONNTAG
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202

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STATEMENT OF THE CASE

In its Statement of the Case, the State of Oklahoma disputes petitioner's assertion that he was not given an opportunity to present evidence to the jury in mitigation of punishment. The State asserts "to the contrary" that petitioner elected to "stand mute" during the bifurcated stage of the sentencing proceeding at the trial court level. What the State fails to point out is that any evidence or argument in mitigation of punishment would have been

futile and, indeed, irrelevant where the jury was allowed no discretion to exercise leniency in sentencing. The Oklahoma mandatory sentencing statute, 21 O.S. Supp. 1977, §51(B), required that petitioner be given a 40-year term upon a jury finding that he had been convicted of two prior felonies.

Petitioner also takes issue with the State's account of his prior convictions. First, there were only two such prior convictions rather than three as alleged at page 7 of the Respondent's Brief. Second, while the State of Oklahoma notes correctly that petitioner was previously convicted of Second-degree Burglary, his second conviction was only for Assault and Battery with a dangerous weapon with intent to do bodily harm, rather than the more serious offense alleged at page 33 of the Respondent's Brief.

ARGUMENT

The State of Oklahoma, in its Brief, failed to raise any substantial new issues. Therefore, an extended reply brief is not necessary. Detailed responses to respondent's arguments, where essential, will be presented on oral argument. However, insofar as respondent's characterization of several key issues is potentially misleading, and in order to avoid confusion at oral argument, several brief points ought to be made at this time.

I.

PETITIONER WAS DENIED PROCEDURAL DUE PROCESS WHEN THE OKLAHOMA COURT OF CRIMINAL APPEALS SENTENCED HIM TO 40 YEARS IMPRISONMENT UNDER THE OKLAHOMA HABITUAL CRIMINAL STATUTE 21 O.S. Supp. 1977, §51(A).

A. The Court of Criminal Appeals Violated Due Process When It Failed to Follow Oklahoma Law Which Entitled Petitioner to be Sentenced by a Jury.

The State of Oklahoma argues that because 22 O.S. §1066 grants the Oklahoma Court of Criminal Appeals the power to modify sentences, this Court should uphold the action of the Court of Criminal Appeals in resentencing petitioner as a simple act of sentence "modification."

Plainly, what the Court of Criminal Appeals has worked in this case is not a "modification" but a resentencing. Oklahoma law is clear that a sentence imposed under an unconstitutional statute (as §51(B) has already been declared to be) is void and of no effect. *Brown v. State*, 24 P.2d 1013 (Okl.Cr. 1933); *Karns v. State*, 224 P. 373 (Okl.Cr. 1924); see also *Ex Parte Lange*, 18 Wall. 163, 85 U.S. 872, 879. Further, the sentence imposed by the Court of Criminal Appeals was not a mere modification of sentence length under the same statute upon which the petitioner was originally sentenced. Instead, it was the institution of a sentence under a *different* statute which presented *different* sentencing criteria. There has been no initial exercise of sentencing discretion by the jury for the

appellate court to "modify." Instead, the first and only exercise of sentencing discretion was by the Court of Criminal Appeals. This is an act *de novo*, not an act of modification. Petitioner was thus denied his right to jury sentencing guaranteed by Oklahoma law in 22 O.S. §926, which reads:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant, assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

There is a touch of inconsistency in Oklahoma's Brief. It acknowledges first that its Court of Criminal Appeals has the power to modify a sentence under §1066 *only* "where it is apparent that an injustice has been done" (Br. of Resp. at 17), and the sentence is "so excessive as to shock the conscience of the court" (Br. of Resp. at 7, 38). If the former sentence is subject to modification only if it is conceded to be fundamentally unjust and shockingly excessive, how then can the State of Oklahoma justify the second sentence which was *identical* to the first and which accorded the petitioner even less procedural safeguards than did the first sentencing procedure?[1]

The State of Oklahoma then asserts that a criminal defendant's right to jury sentencing in Oklahoma is not absolute, citing 22 O.S. §927, which provides:

> Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court

[1]At least the petitioner was physically present during the first sentencing procedure.

> shall assess and declare the punishment and render the judgment accordingly.

It is clear from the cases, however, that this auxiliary sentencing power of the court is not to be exercised except in cases where a jury is hopelessly deadlocked. *Shanahan v. State*, 354 P.2d 780 (Okl.Cr. 1960). Furthermore, in *Epperson v. State*, 181 P.2d 292 (Okl.Cr. 1947) (overruled on other grounds, *Fulton v. State*, 491 P.2d 789 (1971)), the Court of Criminal Appeals held that the defendant had to be resentenced by the jury where the initial sentence was found to have been under the wrong section of the habitual offender statute.

If anything is clear from the record, it is that the only jury to ever consider petitioner's sentence did *not* fail to agree on a sentence nor was there any deadlock. Indeed, there was nothing for the jury to disagree about as it was instructed that 21 O.S. Supp. 1977, §51(B), expressly required that the jury return a mandatory sentence of 40 years imprisonment. The triggering event for §927 never occurred, nor did the Court of Criminal Appeals below even seek to justify its authority to impose a new sentence under this statute.[2]

[2]The State of Oklahoma cites *Rose v. Hodges*, 423 U.S. 19, for the proposition that a defendant does not have a United States Constitutional right to be resentenced by jury following reversal of his first sentence. This misses the point of petitioner's argument entirely. Petitioner is not arguing that the United States Constitution establishes a right to be sentenced by a jury—either initially or upon any resentencing that may occur. What petitioner *is* asserting is that the United States Constitution requires a state to follow its own criminal procedures in convicting and sentencing its defendants and, if a deviation from such procedures results in a potentially grievous injury to any defendant's protected liberty interests, then due process have been denied such defendant. Oklahoma has *chosen* to give all its defendants a right to be

(continued)

The State of Oklahoma stands convicted by the clear language of its own statutes, by its own judicial precedent, and by straightforward logic. It simply took a shortcut in resentencing petitioner and that deviation deprived petitioner of an admittedly sacred right to be sentenced by jury. When this deviation potentially inflicted a grievous loss upon petitioner's constitutionally protected liberty interests (acknowledged to be such at page 18 of Respondent's Brief), it constituted a violation of the Due Process Clause.

B. The Court of Criminal Appeals Violated Due Process When It Imposed a New 40-Year Discretionary Sentence Against Petitioner Without Giving Him Notice, a Hearing, or an Opportunity to Present Mitigating Evidence.

The State of Oklahoma concedes the main point asserted in this section of Petitioner's Brief that due process requires a sentencing procedure that affords the defendant notice, a hearing and an opportunity to present mitigating evidence (Br. of Resp. at 20–22).

The State advances only two defenses. First, it asserts that, while these "basic due process requirements [are] . . . applicable [at] . . . the trial court level," they are inapplicable when the sentence is imposed by the appellate court (Br. of Resp. at 21). It should not be surprising that the State

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(footnote continued from preceding page)
sentenced by jury. The State acknowledges this at page 24 of its Brief. Having given this right, it cannot be withheld from Hicks without violating the Due Process Clause of the U.S. Constitution. Otherwise, the *Rose* case is quite inapposite as the only question decided there was whether, under Tennessee law, a governor has the executive power to commute a sentence after the court has set it aside. No such issue is presented in our case.

of Oklahoma is unable to advance even one authority for this proposition that an appellate court may ignore with impunity the basic due process requirements that bind the trial court. Petitioner's 40 years in prison will seem as long to him regardless of whether that sentence was unconstitutionally imposed upon him without notice or hearing by the trial court or the appellate court.

The only other argument advanced by the State of Oklahoma is that petitioner was afforded an opportunity to present mitigating factors before the jury and that he had three opportunities to plead for leniency: before the jury; before the trial court at the time the sentence was entered; and before the appellate court. The State then asks, "How many opportunities must the State afford to a particular offender to persuade the trier of punishment to impose leniency . . . ?"

Let us look briefly at these three opportunities. Before the jury, petitioner was being tried under 21 O.S. Supp. 1977, §51(B), which authorized no jury discretion for leniency at all. The jury was instructed that,

> [S]hould you find that this defendant has been twice convicted of felony offenses . . . then you shall assess his punishment at forty (40) years . . . . (A. 9)

The prosecutor jumped on this theme by arguing,

> It is mandatory that they get forty years if you find that he has been convicted of two felonies before. (A. 20)
>
> And I—the State doesn't feel that there is really any alternative on it . . . . (A. 25)

Evidence of mitigation was irrelevant and would undoubtedly have been excluded. Argument for leniency would have been a useless act because even the State admits that the jury had no choice. Clearly there was no hearing

opportunity here to present evidence of mitigating factors upon which a proper exercise of sentencing discretion could be based.

Let us turn to the "opportunity" that petitioner had to present mitigating evidence or to plead for leniency before the trial judge at the time he entered the 40-year sentence found by the jury. 22 O.S. §926 required the trial judge to enter judgment in accordance with the jury-determined sentence, and 22 O.S. Supp. 1977, §991a, forbids a trial judge from suspending any part of a sentence when the defendant being sentenced has had two or more prior felony convictions. The trial judge well understood his powerlessness to exercise sentencing discretion or to consider mitigating evidence or a plea for leniency when he didn't even bother to order a presentencing report on petitioner. The trial court mechanistically entered judgment on the jury verdict of forty years (A. 42–44).

On appeal to the Court of Criminal Appeals, petitioner's "opportunity" to argue leniency under 21 O.S. Supp. 1977, §51(A), was even more illusory. He didn't even know he was to be sentenced under §51(A) until after his appeal was ruled upon. He has no hearing before the Court of Criminal Appeals and absolutely no warning that the court would sentence him under the discretionary standards of §51(A) until it was a *fait accompli*.

Under any fair reading of the facts in this case, the State of Oklahoma has practically conceded error on this point.

C. The Court of Criminal Appeals Violated Due Process When It Sentenced Petitioner to 40 Years Imprisonment Under a Statute that Allowed Wide Sentencing Discretion But Provided No Meaningful Standards to Guide That Discretion.

The State of Oklahoma advances no new arguments in this section of its Brief, so no reply is necessary.

D. The Court of Criminal Appeals Violated Due Process When It Failed to Offer Any Rationale or Basis For the Sentence That It Imposed Against Petitioner.

Once again the State of Oklahoma does not really take issue with the constitutional standard that a discretionary sentence must be supported by an adequate rationale explaining the particular sentence imposed (Br. of Resp. at 30). However, the State argues that the Court of Criminal Appeals advanced an adequate rationale in its Opinion and in the record before it.

We start with the record itself. There was no presentence report and no evidence in the record of the petitioner's background or any mitigating circumstances. There is nothing in the record explaining or shedding any light on the prior felony convictions beyond the mere recitation of the statutory sections violated. The appellate court never even laid eyes on petitioner before it exercised its sentencing discretion against him. At no time did petitioner or his court-appointed counsel ever have a hearing or opportunity to argue for leniency under §51(A). The record is totally inadequate to enable any sentencing authority to exercise its

discretion in any balanced and informed manner.

We turn next to the Opinion itself of the Court of Criminal Appeals. Here the only rationale advanced by the Court of Criminal Appeals is that 40 years is "within the range of punishment authorized by the provisions of 21 O.S. Supp. 1977, §51(A)" (A. 58). But this authorized range is from 10 years to life! This tells us nothing of the basis upon which the discretion was exercised to give Hicks 40 years rather than 10 years or life. In a great many cases, this Court has found an abuse of discretion in sentencing even though the sentence was within the range permitted by the statute. (See cases cited at pp. 57–58 of Petitioner's Brief.)

It seems elemental that before the exercise of discretion can be tested for abuse, the bases for the exercise of such discretion must be set forth by the discretion-exercising body so that it can be reviewed on appeal. This much is required when parole is revoked, *Morrissey v. Brewer*, 408 U.S. 471, 489; when probation is revoked, *Gagnon v. Scarpelli*, 411 U.S. 778, 786; when good time credits are revoked, *Wolff v. McDonnell*, 418 U.S. 539, 563; or when welfare benefits are revoked, *Goldberg v. Kelly*, 397 U.S. 254, 271. Can the imposition of a 40-year sentence require any less?

E. The Court of Criminal Appeals Violated Due Process When It Affirmed and Resentenced Petitioner Under a Different Statute Than the One Relied Upon At Trial.

The State of Oklahoma has omitted entirely this section from its Brief and it offers no response to the arguments advanced. Therefore, no reply is needed.

II.

IT WAS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO SENTENCE PETITIONER TO 40 YEARS IMPRISONMENT UNDER 21 O.S. Supp. 1977, §51(A).

A. Punishment Under 21 O.S. Supp. 1977, §51(A) Is Cruel and Unusual Because It Makes No Measurable Contribution to Acceptable Goals of Punishment, But Rather Constitutes Only the Needless Imposition of Pain and Suffering.

The State of Oklahoma misses the point of this argument that the Eighth Amendment requires proportionality: some reasonable relationship between the penalty and the offense. Section 51(A) requires no such relationship and there is not any guidance to the sentencing authority suggesting or requiring such a nexus.

The strongest defense that the State can muster for §51(A) under the Eighth Amendment is the following,

> In summation, the only acceptable formula which can be promulgated in comparing punishment with the seriousness of the offense, must remain flexible; and although the jury may arguably be saddled with unbridled discretion, *it cannot be said that in the majority of cases the decision of the jury to impose a sentence within the limits of the statute has been contra to the rudimentary demands of justice and fair play.* (Emphasis added.) (Br. of Resp. at 36)

We have come to a sad point in history if it is constitutionally sufficient to say that at least a majority of the

sentences meet the rudimentary demands of justice and fair play. This standard will be of little comfort to the minority who may suffer unfair or excessive sentences based on hidden notions of passion, prejudice, or capriciousness because of inadequate legislative guidance and controls requiring proportional sentencing.

The State at page 33 of its Brief asserts that petitioner's argument would allow an offender to commit two murders before the sentence of death could be imposed for a third murder. Not at all. If the Legislature were to decide that a single offense of murder warranted the death penalty, it would do so under current law. At least it would have established a specific relationship between the offense and the punishment. It would not take repeated murders in such a situation to invoke the death penalty. The problem, however, with §51(A) is that there is no legislative effort to relate the punishment to the offense.

B. Petitioner's Sentence Is Cruel and Unusual Because It was Inflicted in an Arbitrary and Capricious Manner.

The only new argument raised by the State here is the reference to the Oklahoma harmless error statute, 20 O.S. §3001. First, of course, is the fact admitted by the State that this statute was not even in force at the time the Oklahoma Court of Criminal Appeals switched statutes on petitioner. More fundamental, it strains credibility to argue that the loss of jury sentencing, the loss of a bona fide and meaningful hearing on sentencing, the loss of a chance to present mitigating evidence, being sentenced under a statute without any proportionality or effective standards, and the loss of a

chance to obtain a minimum 5 or 10 year sentence rather than a 40-year sentence are mere harmless errors.

III.

PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAW WHEN HE WAS CLASSIFIED UNDER AN ADMITTEDLY UNCONSTITUTIONAL STATUTE AND THEN, BASED UPON THAT CLASSIFICATION, HE WAS DISCRIMINATED AGAINST BY BEING DENIED STATE AND FEDERALLY GUARANTEED RIGHTS.

The State of Oklahoma throughout its argument slips into the mistaken assumption that the classification of which petitioner complains is the classification between habitual offender and first time offenders. So that there is no mistake, petitioner would again state this is *not* the classification of which he is complaining.

The classification which forms the basis of the equal protection argument is the classification between alleged habitual criminals who were initially prosecuted under the unconstitutional statute §51(B) (and later resentenced under §51(A)) and those alleged habitual criminals who were initially prosecuted under §51(A). On the basis of this admittedly unconstitutional classification, petitioner was deprived of the many fundamental rights pertaining to sentencing procedures discussed in Petitioner's Brief.

Finally, it is worth noting that the State acknowledges that if it were required to resentence those defendants like petitioner who were initially erroneously sentenced under

§51(B), "the fiscal burden which might be incurred . . . would be minimal." Thus, under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, the interests advanced by petitioner for a new sentencing procedure should prevail.

CONCLUSION

Petitioner's sentence should be reversed and this matter should be remanded to the Oklahoma Court of Criminal Appeals for a new sentencing procedure that complies with due process, equal protection and the Eighth Amendment.

Respectfully submitted,

/s/ David M. Ebel
DAVID M. EBEL
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202
Telephone: (303) 892-9400
Court-appointed Counsel for Petitioner

Of Counsel:
RICHARD A. SONNTAG
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202